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Congress of the United States

House of Representatives

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May 31, 2000

BY FACSIMILE

The Honorable Alexis M. Herman
Secretary
Department of Labor
200 Constitution Avenue, N.W. - Room S2018
Washington, D.C. 20210

Dear Madam Secretary:

This letter continues our investigation of the Federal agencies' use of non-codified documents (such as guidance, guidelines, manuals, and handbooks) as opposed to codified regulations or legislation. Early this year, the Department of Labor (DOL) admitted that all of its Occupational Safety and Health Administration non-codified documents issued since March 1996 do not have general applicability and future effect and are not legally binding. I understand that DOL will be admitting that they also do not have any legal effect. On February 15, 2000, DOL's Solicitor testified that DOL's non-codified documents were not being used as backdoor rulemaking. Now, our investigation is turning to the Federal agencies' use of codified regulations instead of legislation for significant policy changes without a specific delegation by Congress, i.e., backdoor legislating.

First, DOL's regulatory proposal to use unemployment compensation for paid family leave seems to me to be backdoor legislating. As a consequence, I object to DOL's pending final rule, entitled "Birth and Adoption Unemployment Compensation" (popularly known as "Baby UI"). I have concerns not only about the statutory basis for this rulemaking but also about DOL's compliance with certain provisions governing codified regulations, including Executive Order (E.O.) 12866, the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Regulatory Flexibility Act (RFA), the Unfunded Mandates Reform Act (UMRA), and the Paperwork Reduction Act (PRA). To be fair to DOL and to understand the basis for its approach, I asked to review all of its internal legal analyses relating to its decision to propose a regulatory change instead of initiating a legislative proposal ("DOL's 48 internal documents"). I also wanted to see how DOL analyzed its legal obligations under E.O. 12866 and the aforementioned laws governing rulemaking.

After reviewing DOL's proposed rule, the public comments received before publication, during the 60-day public comment period, and after the close of the comment period, and DOL's 48 internal documents, I challenge DOL's decision to pursue a regulatory change instead of initiating a legislative proposal. Section 604.10 in DOL's proposed rule states, "Under [DOL's] authority to interpret Federal unemployment compensation law, the DOL interprets the Federal able and available requirements to include experimental Birth and Adoption unemployment compensation" (64 FR 67977). However, DOL's preamble admits that "no explicit able and available requirements are stated in Federal law" (64 FR 67972). Interestingly, there are also no able and available requirements in DOL's codified rules governing its unemployment compensation program.

Instead, Federal law authorizes DOL to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [DOL] is charged under this chapter" (42 USC §1302(a)). Federal law requires DOL to approve any State law which provides that "all money withdrawn from the unemployment fund of the State shall be used **solely** in the payment of unemployment compensation" (26 USC §3304(a)(4), emphasis added). Federal law defines "compensation" to mean "cash benefits payable to individuals with respect to their unemployment" (26 USC §3306(h)). I note that Federal law does not define "unemployment," presumably since its meaning is commonly understood.

In a March 1999 memorandum, DOL's Solicitor's Office asserted that the design of the unemployment compensation system is rooted in the common understanding of the word "unemployment" and that DOL has consistently held that unemployment must be involuntary and due to an inability to find suitable work. A 1945 Social Security Board non-codified guidance document provided by DOL stated, "The Board has held consistently on the basis of the legislative history of the Federal Acts, that the word 'unemployment' as used in the Social Security Act and the Federal Unemployment Tax Act refers only to unemployment due to lack of work." A November 1998 DOL internal document points to the DOL Bureau of Labor Statistics' definition of "unemployed" as referring to someone available to the labor market. In contrast, Baby UI is for persons who are not employed due to lack of work but voluntary choice and persons who are not available to the labor market. Also, DOL admits in Appendix B to its proposed rule that Baby UI "will require some legislation on the part of every State seeking to adopt this program" (64 FR 67977).

Of especial importance is DOL's own rejection of a 1997 proposal by Vermont to use unemployment compensation for paid family leave. On July 17, 1997, DOL wrote Senator Patrick Leahy that, "We have consistently interpreted these provisions as requiring that State UI [unemployment insurance] laws contain tests to assure that UI is **paid only to workers who lose their positions** when employment slackens and who ... cannot find other work ... That this was the intent behind these provisions is clearly demonstrated by the history of the 1935 legislation creating the Federal-State UI program ... stated that, to serve its purposes, UI 'must be paid only to workers **involuntarily unemployed**' (emphases added).

A DOL internal document admitted that, after the decision was made to use unemployment compensation for paid family leave, DOL challenged its employees to think outside the box and see what flexibility actually existed in Federal law. Unfortunately, several DOL internal documents, including a March 1998 memorandum, conclude that Federal law needs to be amended to use unemployment compensation for paid family leave. In a March 1999 memorandum, DOL's Solicitor's office presented the pros and cons of a Legislative Fix as opposed to a Regulatory Fix, recommending that carefully drafted legislation is the best vehicle because a regulatory fix would likely not survive a court challenge given the legislative history, the legislative framework of the unemployment compensation program, and the Federal Government's longstanding interpretation. The memorandum concluded that the court is likely to invalidate such a DOL regulation as an arbitrary agency action. Another DOL internal document mentioned possible challenges to the rule on equal protection and/or Administrative Procedure Act (APA) grounds.

As a consequence, I contend that, even for an experiment, such a major substantive revision of the unemployment compensation program requires a change in Federal law. Congress did not delegate its legislative authority to DOL to make such a major revision of this program through rulemaking. The Supreme Court recently struck down a similar attempt by an executive agency, holding that the Food and Drug Administration could not regulate tobacco products without a specific authorization from Congress. The Supreme Court found that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress" (*Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, p. 1315). I believe that DOL's proposed major revision of unemployment compensation is a usurpation of legislative authority solely granted to Congress under Article I of the Constitution and, therefore, is illegal.

Second, E.O. 12866 requires agencies to provide an assessment of the potential costs and benefits of the regulatory action for all "significant" regulatory actions, i.e., including DOL's Baby UI regulatory action. For those regulatory actions which "may" have an annual effect on the economy of \$100 million or more, the Order requires agencies to provide more detailed cost-benefit analysis (also known as a regulatory impact analysis (RIA)), including an identification and assessment of "reasonably feasible alternatives to the planned regulation" (Sec. 3(f)(1) & Sec. 6(a)(3)(C)). Section 804 of SBREFA defines a major rule as one which is likely to result in an annual effect on the economy of \$100 million or more.

I question the underlying logic behind DOL's proposed rule cost estimate, which ranges from zero to \$68 million, because DOL's flawed methodology assumed that only four States would volunteer for Baby UI. DOL's preamble admits that the \$68 million estimate "is based on the expressed interest of a small number of States" (64 FR 67975). Many public commenters challenged DOL's underestimate of the costs and instead estimated costs up to \$36 billion (e.g., see 2/2/00 U.S. Chamber of Commerce, pp. 2 & 8). If more States volunteered, the cost clearly "may" exceed the \$100 million threshold for an RIA. In fact, March 9, 2000 testimony before the House Ways and Means Subcommittee on Human Resources revealed that eight States are

considering Baby UI. A March 2000 DOL decision memorandum admitted that DOL's authority and cost considerations are, indeed, the most sensitive issues in the 3,800 Congressional and public comments. However, this same memorandum did not reveal to you the methodologies behind the many estimates in the billions of dollars and the reasons for DOL staff's rejection of these methodologies. Instead, the memorandum revealed DOL staff's revised upper costs estimate as \$91 million instead of \$68 million.

Commenters also expressed concern about noncompliance with the RFA and the SBREFA (e.g., see 2/2/00 U.S. Senate Committee on Small Business, pp. 1 & 3). Chairman Kit Bond stated,

The Department has misconstrued its obligation under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA) and consequently has wrongly decided not to determine the consequences of this rulemaking on small businesses. ... this rule has a potentially very serious impact on virtually all small businesses which should have triggered a regulatory flexibility analysis as required by the RFA ... any employer that is subject to the federal unemployment tax will be covered and would be obligated to provide this leave if the state in which the employer operates implemented this provision (p. 3).

I share this concern, especially about the absence of a full analysis in DOL's proposed rule and DOL's 48 internal documents of the substantial effects on small businesses.

Congress specifically exempted small businesses from the Family and Medical Leave Act's (FMLA's) **unpaid** leave provisions. In fact, in recognition of the effect on employers, FMLA included other eligibility factors as well. The Associated Builders and Contractors, Inc. comment letter stated,

this aspect of the proposal is inconsistent with Federal FLMA law as written and passed by Congress. Congress extensively debated and ultimately required a whole host of eligibility factors for family leave provided under the Family and Medical Leave Act. For example, Congress decided to limit employee eligibility to those with twelve months of service and to those who worked at least 1250 hours within the twelve months preceding the leave. Congress also chose not to cover businesses with fewer than 50 employees. Additionally, Congress provided a key employee exemption that allows companies to exclude certain highly compensated and key individuals from the unpaid mandate. In contrast, the BAA-UC [Baby UI rule] provides leave payments to all covered individuals, regardless of income (2/2/00, p. 5).

LPA, Inc. commented, "Although Congress found that *unpaid* family leave was too burdensome to impose upon small business and therefore exempted them from the obligations imposed by the FMLA, see 29 U.S.C. § 2612(c), no similar exception can be carved out of the unemployment compensation system because, as the NPRM recognizes, any eligibility test for unemployment

compensation must relate directly to the fact or cause of the individual's unemployment" (2/2/00, p. 12).

The Republican Governors Association objected to the proposal on several grounds, commenting,

The Department of Labor's proposed regulations also create another layer of administrative burden on states and employers, which could further harm the solvency of the UI system. This action creates more opportunities for fraud and abuse, again placing the solvency of the fund at risk. This effort is a backdoor, **unfunded** approach that would be harmful to state government treasuries as well as the UI Trust Fund. It could also threaten the continued growth and prosperity of small businesses. If the federal government wants to pursue this as national policy, then the issue should be taken before the U.S. Congress, and funded accordingly (emphasis added) (12/2/99, p. 1).

The Employment Policy Foundation's comment letter analyzed the effect of Baby UI on recommended State solvency levels and projected State tax rate increases that would be needed to stem the trust fund depletion. For example, under four scenarios (with 12 or 26 weeks of paid leave and under two different take-up assumptions), New York would require a 32% to 129% tax rate increase (1/26/00, p. 10).

Interestingly, DOL's 48 internal documents gave short shrift to compliance with the UMRA. In fact, there appeared to be only one dismissive reference to the impact on States, referring to the fact that DOL's experimental approach calls for voluntary participation by a State. Nonetheless, as noted above, there are various costs and cost considerations for States under this significant rule. As a consequence, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that DOL prepare a final RIA, including costs and cost considerations for States, and a final regulatory flexibility analysis, including costs for small businesses, before DOL issues a Baby UI final rule.

Third, I was surprised that DOL's preamble for the proposed experiment admits that "The Federal evaluation methodology has not yet been completed" (64 FR 67974). In fact, a DOL internal document indicated that DOL felt that it seemed counterproductive to spend considerable time developing a methodology that would delay implementation of the experiment. However, an evaluation is critical for any experiment, especially this one since DOL's preamble states that the evaluation "may also serve as a basis for further expanding coverage to assist a broader group of employees to better balance work and family needs" (64 FR 67974). What will be the effects of the experiment on State taxes, State unemployment benefit levels, solvency of State unemployment funds, etc.? By what outcome performance measures will the success or failure of this experiment be judged?

As a consequence, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that DOL complete its proposed evaluation methodology,

including the specifics of any necessary reporting and recordkeeping, and submit its proposed paperwork burden for public comment under the PRA before DOL issues a Baby UI final rule. I also request that DOL delay the final rule's effective date until DOL has analyzed the public comments and finalized the reporting and recordkeeping requirements essential to the evaluation of the experiment.

If you have any questions about this letter, please contact Professional Staff Member Barbara Kahlow at 226-3058.

Sincerely,

A handwritten signature in black ink that reads "David McIntosh". The signature is written in a cursive, flowing style.

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich